

U.S. Department of Labor Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0124 BLA

STEPHEN R. JOHNSTON

Claimant-Petitioner

$$V.$$

U.S. STEEL CORPORATION

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: 10/19/2016

DECISION and ORDER

Appeal of the Decision and Order of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Key Castro & Chaney PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (14-BLA-5396) of Administrative Law Judge Scott R. Morris denying claimant's request to modify the denial of benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act) (2012). This case involves claimant's second request for

modification of the denial of a claim filed on August 25, 2003.

In the initial Decision and Order, Administrative Law Judge Richard A. Morgan credited claimant with at least thirty years of coal mine employment,¹ and found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), Judge Morgan found that the evidence also established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). However, Judge Morgan found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Morgan denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Morgan's findings pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). *Johnston v. U.S. Steel Corp.*, BRB No. 06-0628 BLA (Mar. 27, 2007) (unpub.). The Board, however, vacated Judge Morgan's finding that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), and remanded the case for further consideration. *Id.*

In a Decision and Order on Remand dated July 9, 2008 Judge Morgan again found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Judge Morgan, therefore, denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Morgan's finding pursuant to 20 C.F.R. §718.204(c). *S.J. [Johnston] v. U.S. Steel Corp.*, BRB No. 08-0726 BLA (June 18, 2009) (unpub.). The Board, therefore, affirmed Judge Morgan's denial of benefits. *Id.*

Claimant requested modification on August 6, 2009. Director's Exhibit 51. In a Decision and Order dated July 29, 2011, Administrative Law Judge Thomas M. Burke found that the new evidence did not assist claimant in establishing that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and therefore, claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Judge Burke also reviewed the entire record *de novo* to assess whether a mistake in a determination of fact was made in the prior adjudication. Contrary to Judge Morgan's prior determination, Judge Burke found that all of the

¹ The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

evidence of record, when weighed together, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge, therefore, denied claimant's request for modification.

Pursuant to claimant's appeal, the Board affirmed Judge Burke's determination that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, as unchallenged on appeal. *Johnston v. U.S. Steel Co.*, BRB No. 11-0764 BLA (Aug. 17, 2012) (unpub.). The Board also rejected claimant's argument that Judge Burke was bound by Judge Morgan's prior finding that claimant established the existence of clinical pneumoconiosis, and erred in revisiting that issue in his consideration of claimant's modification request. *Id.* The Board held that Judge Burke acted within his discretion in determining that evidence submitted before Judge Morgan, considered in conjunction with the new evidence submitted on modification, did not establish the existence of pneumoconiosis. *Id.* Because claimant did not allege any specific error with regard to the manner in which Judge Burke weighed the conflicting x-ray and medical opinion evidence, the Board affirmed his findings that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis² pursuant to 20 C.F.R. §718.202(a)(4). *Id.* The Board further affirmed Judge Burke's finding, based upon a weighing of all of the evidence of record, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* The Board noted that claimant's failure to establish the existence of pneumoconiosis, a requisite element of entitlement, precluded an award of benefits. *Id.* The Board, therefore, affirmed Judge Burke's denial of claimant's request for modification.

Claimant filed a second request for modification on July 22, 2013. Director's Exhibit 83. In a Decision and Order dated November 20, 2015, Administrative Law Judge Scott R. Morris (the administrative law judge) found that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, denied claimant's request for modification. 20 C.F.R. §725.310.

² "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

On appeal, claimant argues that the administrative law judge erred in denying his request for modification. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310. When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Claimant argues that the administrative law judge erred in denying his request for modification. We disagree. The administrative law judge considered Dr. Ahmed's positive interpretation of an October 12, 2012 x-ray, which was the only new evidence submitted by claimant in support of his modification request. Director's Exhibit 83. Although the administrative law judge noted Dr. Ahmed's status as a B reader and Board-certified radiologist, he further noted that employer submitted a negative interpretation of this x-ray by an equally qualified physician, Dr. Willis. Decision and Order at 11; Director's Exhibit 85. Because the administrative law judge found that the interpretations of the October 12, 2012 x-ray were "in equipoise," he found that the x-ray was "inconclusive as to the presence or absence of pneumoconiosis." Decision and Order at 11

Considering all of the evidence of record (the new evidence, along with the previously submitted evidence before Judges Morgan and Burke), the administrative law judge found that the medical evidence did not establish either clinical or legal pneumoconiosis. Decision and Order at 16. The administrative law judge, therefore,

found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Id.*

Claimant generally argues that the administrative law judge erred in not weighing all of the evidence together, consistent with the holding in *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000). Claimant's Brief at 7-10. We disagree. In *Compton*, the United States Court of Appeals for the Fourth Circuit held that all types of relevant evidence under Section 718.202(a) must be weighed together to determine whether a claimant suffers from pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174. In this case, the administrative law judge considered all of the relevant evidence, both new and old, and permissibly found that the medical evidence does not establish either clinical or legal pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

Claimant alleges no specific error in regard to the administrative law judge's determination that the evidence does not establish the existence of clinical or legal pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's findings that neither the new evidence, nor the evidence as a whole, establishes the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's findings that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. We, therefore, affirm the administrative law judge's denial of claimant's request for modification.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge